IN THE HIGH COURT OF BOMBAY AT GOA.

LETTERS PATENT APPEAL NOS. 16 AND 17 OF 2001.

LETTERS PATENT APPEAL NO. 16 OF 2001.

Jairam Malvankar, bus
conductor, r/at H. No. 206,
Naroa, Taliwadda, Bicholim. ... Appellant.

Versus

1. Industrial Tribunal, Goa,
   with office at Junta House,
   Panaji, Goa.
2. Kadamba Transport Corporation
   Ltd., with office at Kadamba
   Bus Stand, Panaji, Goa. ... Respondents.

LETTERS PATENT APPEAL NO. 17 OF 2001.

Jude Araujo, auto mechanic,
r/at Village Angela, S.
Caetano Ward, Merces, Ilhas,
Goa. ... Appellant.

Versus

1. Industrial Tribunal, Goa,
   with office at Junta House,
   Panaji, Goa.
2. Kadamba Transport Corporation
   Ltd., with office at Kadamba
   Bus Stand, Panaji, Goa. ... Respondents.

Mr. M.B. D'Costa with Mr. J.A. Lobo, Advocates for the Appellant in both the Appeals.

Mr. S.G. Dessai, Senior Advocate with Mr. D.B. Ambekar, Advocate for the Respondent No. 2 in both the Appeals.

Coram: P.V. KAKADE AND P.V. HARDAS, JJ.

Date of reserving the Judgment: 7.10.2002.

Date of pronouncing the Judgment: 28.10.2002.

J U D G M E N T (PER HARDAS, J.)

These Appeals have been filed against the Judgment of the learned Single Judge, dated 15th June

2001, by which the Single Judge dismissed Writ Petition No. 339 of 1999 filed by the appellant in Letters Patent Appeal No. 16 of 2001 and Writ Petition No. 338 of 1999 filed by the appellant in Letters Patent Appeal No. 17 of 2001. By the common Judgment, the learned Single Judge had also dismissed Writ Petition No. 134 of 2001, which was filed by one Dina Naik, who has chosen not to file a Letters Patent Appeal. The aforesaid three petition were disposed of by a common Judgment by the learned Single Judge. These Appeals are, therefore, decided by this common Judgment.

2. The facts necessary for the decision of these Letters Patent Appeals are set out hereunder:-

The misconduct alleged against the appellants in the Letters Patent Appeals arise out of the same incident, namely, obstructing bus bearing registration no. GDX 126 belonging to the respondent no. 2 on 15th April 1984 at about 1.00 p.m.. The appellants are the employees of the respondent no. 2. The appellant in Letters Patent Appeal No. 17 of 2001 (petitioner in Writ Petition No. 338 of 1999) is an Assistant Auto Mechanic and the appellant in Letters Patent Appeal No. 16 of 2001 (petitioner in Writ Petition No. 339 of 1999) is a bus Conductor. The original petitioner in Writ Petition No. 134 of 2001, who was a Driver, has

chosen not to file a Letters Patent Appeal. The respondent no. 2 is a Government Company carrying on business of passenger transport through stage carriage and is performing a public utility service.

3. The Industrial Tribunal, after recording the evidence of the parties, by its Award, dated 1st April 1999, in Reference No. IT/3/88, in respect of the appellant in Letters Patent Appeal No. 16 of 2001 held that the action of the Management of the respondent no. 2 Corporation in terminating the services of the appellant with effect from 16th February 1986 was not legal and justified and, accordingly, ordered reinstatement of the appellant in service with 30% of the back wages from the date of termination of his service till the date of the Award and further ordered that the appellant shall be entitled to full wages and other benefits from the date of the Award.

4. The Industrial Tribunal, in respect of the appellant in Letters Patent Appeal No. 17 of 2001, by its Award, dated 4th June 1999, in Reference No. IT/62/87, also held that the termination of the services of the appellant with effect from 24th August 1985, was not legal and justified and ordered the appellant to be reinstated in services with 30% of the back wages from the date of termination of his service till the date of

the Award and further ordered that the appellant shall be entitled to full wages and other benefits from the date of the Award.

5. Both the appellants, in the Letters Patent Appeals before us, filed Writ Petitions in the High Court, which were heard by the learned Single Judge, and, who, by his Judgment, dated 15th June 2001, dismissed the petitions. The principal point which was urged on behalf of the appellants was that the Industrial Tribunal erred in not granting full back wages and the Tribunal did not correctly appreciate that other employees, who were also guilty of the same misconduct had not been proceeded against and, in fact, some of them had been promoted. This plea was urged as the Tribunal itself had held that the respondent no. 2 had discriminated between the appellants and the other employees, who had also committed a similar act of misconduct. The learned Single Judge in paragraph 10 of his Judgment has held that though there is patent discrimination between the appellants and the other employees, who had participated in the strike and committed acts of misconduct, the same cannot be made the basis for challenging the Award or for claiming full back wages. The learned Single Judge also held that the plea of discrimination was belatedly taken up before the Tribunal and the Tribunal had no powers to direct action

to be taken against the other employees, who had indulged in similar acts of misconduct. The learned Single Judge, therefore, dismissed the petitions. Hence, the present Letters Patent Appeals.

6. Mr. D'Costa, the learned counsel appearing on behalf of the appellants has drawn our attention to the Statement of Claim, which was filed before the Industrial Tribunal. At ground "(v)" it is stated that the action of the employer was discriminatory as the other employees, who were alleged to have committed the same misconduct, were exonerated and the charge sheets/suspension orders against them were withdrawn. Mr. D'Costa has further invited our attention to the examination-in-chief of the respondents' witness Vallenth Esteves wherein the witness had admitted that, apart from the present appellants, there were other employees, who had stopped the bus. In the cross-examination this witness had admitted that the other employees, who were alleged to have indulged in the similar misconduct, were still working. He had also admitted in the cross-examination as under:-

> "It is true that some of the workers namely, Shri Bhiku Shet, Sultan Khan, Ramesh Madgaonkar, Mohan Maulinkar, Anand Maulinkar, Parshuram Kharve, R.D. Gawas and Vinayak Naik have been taken back in service."

Mr. D'Costa has further invited our attention to the

deposition of the second witness examined on behalf of the respondents, namely, Anil Balchandra Prabhu. This witness admitted that other employees had also indulged in similar misconduct and had admitted that out of those employees, three were promoted as Assistant Traffic Controllers. Similar admissions are given by other witnesses, namely, Srikant Vasudeo Naik and Jairam Malwankar. Mr. D'Costa then invited our attention to the Award passed by the Industrial Tribunal and particularly to paragraph 18 of the Award where the Industrial Tribunal has held as under:-

> "... The employer's evidence discussed above shows that the workers Vinayak Naik, Parshuram Karbe, R.D. Gauns were in fact promoted as Asst. Traffic Controller after April 1984 though they had taken the part in obstructing the bus GDX 126 and it was alleged that they had gone on illegal strike. The said workers, according to the employer had committed the same kind of act of misconduct with which the workman was charged. However, the employer applied different sets of rule to the workers. The employer took action and punished some workers including the workman Jairam Malwankar but did not take any action against the others whose names are mentioned above. On the contrary there is an admission on the part of the employer that some were even promoted. <u>This act on the part of the employer is discriminatory. The employer has not given any explanation to justify this discriminatory act on its part. I, therefore, hold that the workman has succeeded in proving that the action of the employer in dismissing him from service is discriminative</u>." (Emphasis supplied).

7. Thus, according to Mr. D'Costa, the learned counsel appearing for the appellants, the plea of discrimination had been taken up at the earliest possible opportunity by the appellants when they had filed their Statement of Claim. That the respondent no. 2 has discriminated between the employees is evident from the material on record and particularly in view of the finding recorded by the Industrial Tribunal. According to Mr. D'Costa, the learned Industrial Tribunal after having held that considering the misconduct and the circumstances under which it was committed, has erroneously granted reinstatement with only 30% of the back wages. According to the learned counsel for the appellants, the Industrial Tribunal has lost sight of the fact that the employer had discriminated between the two sets of workmen and, therefore, ought to have granted reinstatement with full back wages.

8. Mr. Dessai, the learned senior counsel for the respondent no. 2, has urged before us that the Industrial Tribunal has given reasons for awarding only 30% of the back wages and the Award of the Industrial Tribunal has been upheld by the learned Single Judge. The reasonings of the learned Industrial Tribunal cannot be faulted with and, therefore, no interference is called for in these Letters Patent Appeals with the

findings of the Industrial Tribunal and the learned Single Judge of this Court. Moreover, he has urged before us that two Courts have concurrently held that the appellants were entitled to only 30% of the back wages and unless any error in the reasoning of the Tribunal was pointed out, this Court would not normally interfere in the Letters Patent Appeals. In support he has placed reliance on the Judgment of the Apex Court in **P.G.I of Medical Education & Research, Chandigarh v. Raj Kumar,** (2001) 2 S.C.C. 54.

9. It is also urged by Mr. Dessai, the learned senior counsel on behalf of respondent no. 2 that the appellants have been given the benefit of the discriminatory attitude of the respondents by ordering their reinstatement. The discrimination cannot be stretched to seek full back wages. In support of his contention Mr. Dessai, the learned senior counsel has placed reliance on the Judgments of the Supreme Court in **India General Navigation and Railway Co. Ltd. and another v. Their Workmen,** A.I.R. 1960 S.C. 219 and **Karnataka State Road Transport Corpn. v. B.S. Hullikatti,** (2001) 2 S.C.C. 574.

10. The Hon'ble Apex Court in India General Navigation and Railway Co. Ltd. and another (supra) in paragraph 24 has observed thus:-

> " Assuming that it is open to the Management to dismiss a workman who has taken part in an illegal strike, in determining the question of punishment, a clear distinction has to be made between those workmen who not only joined in such strike, but also took part in obstructing the loyal workmen from carrying on their work, or took part in violent demonstrations, or acted in defiance of law and order, on the one hand, and those workmen who were more or less silent participators in such a strike, on the other hand. It is not in the interest of the Industry that there should be a wholesale dismissal of all the workmen who merely participated in such a strike. It is certainly not in the interest of the workmen themselves. An Industrial Tribunal, therefore, has to consider the question of punishment, keeping in view the overriding consideration of the full and efficient working of the Industry as a whole. The punishment of dismissal or termination of services has, therefore, to be imposed on such workmen as had not only participated in the illegal strike, but had fomented it, and had been guilty of violence or doing acts detrimental to the maintenance of law and order in the locality where work had to be carried on."

Relying on the aforesaid observation of the Apex Court, Mr. Dessai contends that it was open to the Management to have proceeded only against some of the employees, who had indulged in the misconduct alleged against the appellants. Such a submission is not open for the respondents, in view of the fact that the learned Industrial Tribunal as well as the learned Single Judge have recorded a finding that the respondent no. 2 has

discriminated between the appellants and the other workmen, who had committed the identical misconduct.

11. Mr. Dessai then placed reliance on another Judgment of the Apex Court in Karnataka State Road Transport Corporation (supra). This was a case where the Hon'ble Apex Court has observed that the order of dismissal of the workman ought not to have been set aside as the act of the workman therein was either dishonest or so grossly negligent that the workman was not fit to be retained as a Conductor as the action or inaction of his was bound to result in financial loss to the respondent Corporation. The appeal by the Karnataka State Road Transport Corporation was disposed of by the Apex Court as, in the meantime, the workman had already superannuated but, the Apex Court directed that the workman would not be entitled to any back wages but would be entitled to retirement benefits. The facts of the aforesaid Judgment of the Apex Court and the ratio therein does not apply to the facts of the present case.

12. Mr. Dessai then relied on the Judgment in P.G.I. of Medical Education & Research, Chandigarh (supra) and particularly to paragraph 14 of the report wherein the Apex Court has observed thus:-

> " Payment of back wages having a discretionary element involved in it has to be dealt with, in the facts and

> circumstances of each case and no straight-jacket formula can be evolved, though, however, there is statutory sanction to direct payment of back wages in its entirety. The decision in the matter of back wages, in the instant case, was taken by the Labour Court having regard to the facts and circumstances of the matter in the issue, upon exercise of its discretion and obviously in a manner which cannot but be judicious in nature. There exists an obligation on the part of the High Court to record in the judgment, the reasoning before denouncing a judgment of an inferior tribunal, in the absence of which, the judgment cannot stand the scrutiny of otherwise being reasonable."

We, therefore, propose to examine whether the discretion exercised by the learned Industrial Tribunal is judicious in nature in awarding only 30% of the back wages.

13. It is an admitted fact, as is apparent from the evidence, the Award of the Industrial Tribunal and the Judgment of the learned Single Judge that other workmen, apart from the appellants, had also indulged in similar misconduct of stopping the transport bus belonging to respondent no. 2. It is also an admitted fact that the respondents showed a lenient attitude and did not proceed against the others. It is also an admitted fact that the other employees, who had indulged in identical misconduct, were promoted and retained in service. The Industrial Tribunal held that the order of termination of the service of the appellants was not legal and justified. The Industrial Tribunal has also

recorded a finding that the respondent employer had discriminated between the appellants and the employees, who had indulged in the misconduct. In fact, the Industrial Tribunal has recorded a finding that the action of the respondent no. 2 in dismissing the appellants from service is discriminatory. The Industrial Tribunal also recorded a finding at paragraph 19 that there was no specific charge against the employee that he had gone on illegal strike along with the others. The Industrial Tribunal also held in the same paragraph that it is possible that the workman took part in stopping the bus on the spur of the moment. In respect of appellant in Letters Patent Appeal No. 16 of 2001, the Industrial Tribunal held that apart from a warning letter dated 15th September 1983 at Exhibit 11 no other evidence had been produced to show the past conduct of the workman was not good. In respect of appellant in Letters Patent Appeal No. 17 of 2001, the Industrial Tribunal in paragraph 19 of its Award has observed that the employer had not produced any evidence to show that the past record of the workman was not good. Admittedly, the Industrial Tribunal has recorded a finding that the appellants were guilty of misconduct and the punishment of dismissal from service was disproportionate to the misconduct alleged against them and, therefore, accordingly ordered their reinstatement. The Industrial Tribunal has taken into consideration the

misconduct which was alleged against the appellants and the manner in which it was alleged to have been committed and, therefore, ordered only 30% of the back wages. To us it is quite clear that the Industrial Tribunal had not addressed itself to the question of discrimination while granting the back wages. The respondent no. 2 had chosen to proceed against only few workmen, though, apart from them, there were other workmen who had indulged in similar act of misconduct. The other set of workmen "that is the favoured workmen" were retained in service and some of them were even promoted. This, according to us, is a singular factor which should have weighed with the Industrial Tribunal while considering the grant of back wages. The Industrial Tribunal has itself recorded a finding that the appellants had not gone on illegal strike. The Industrial Tribunal has also held that the material placed before it did not suggest that the past record of the appellants was not good. It is true that there is a concurrent finding of the Industrial Tribunal and of the learned Single Judge but, concurrent findings cannot be used as a shield against a charge of perversity. According to us, those factors have not been taken into consideration by the Industrial Tribunal while awarding the back wages and the awarding of 30% of back wages is, thus, based on misappreciation of the evidence. In fact, even the learned Single Judge did not address

himself to the misappreciation by the Industrial Tribunal.

14. We have given our anxious considerations to the rival submissions advanced before us and we are of the considered view that in view of the charge of discrimination, the findings of the Industrial Tribunal that the appellants had not gone on illegal strike alongwith the other workers and there was no material to indicate that the past record of the appellants was not good, the award of only 30% of the back wages was not proper. The Industrial Tribunal has also recorded a finding that the period of gainful employment of the appellants was very short and negligible. In the peculiar facts before us, awarding of 30% of the back wages on the ground of gravity of misconduct was not justified. According to us, the appellants are entitled to be reinstated with full back wages.

15. In the result, therefore, the appeals succeed and the Award of the Industrial Tribunal dated 1st April 1999 to the extent of granting only 30% of the back wages and the Judgment of the learned Single Judge dated 15th June 2001 are, hereby, quashed and set aside. It is directed that the appellants are entitled to be

reinstated with full back wages.

(P.V. KAKADE)
JUDGE.

(P.V. HARDAS)
JUDGE.

ed’s.